

BEFORE THE
GOVERNING BOARD OF THE
NATOMAS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusations Against :

ESPINOZA, NELSON
FORD, RODNEY
GOUR, SHAWN
HOWELL, SIDNEY
JACKSON, LUNDON
TRESSA, MIKE (GEORGE)
WILLIAMS, STACY,

Respondents.

OAH No. 2012030963

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on April 25, 2012.

Roman J. Munoz, Attorney at Law, Kronick , Moskovitz, Tiedemann & Girard, represented the Natomas Unified School District.

Carolyn Langenkamp, Attorney at Law, Langenkamp, Curtis & Price, represented all of the respondents who appeared at the administrative hearing.¹

Evidence was received, and the record was left open for letter-briefs filed by the parties on or before April 30, 2012. District's brief was marked exhibit X and respondents' brief was marked 18, and both were made a part of the record. The matter was submitted on April 30, 2012.

¹ Respondent Tressa was not represented by Ms. Langenkamp. He filed a request for a hearing in response to the preliminary notice, but he did not appear at the hearing so his matter was heard as a default pursuant to Government Code section 11520.

FACTUAL FINDINGS

1. Sally L. Clark, Director of Human Resources, Natomas Unified School District (District), State of California, filed the Accusation in her official capacity as a public officer.

2. On March 12, 2012, the Governing Board (Board) of the District adopted Resolution No. 12-11, that reduced and/or discontinued particular kinds of certificated services (PKS) no later than the beginning of the 2012-2013 school year, in the amount of 26.4 full-time equivalent (FTE) certificated employees. The specific reductions were as follows:

Elementary Teaching Services

Physical Education	7.0 FTE
Visual and Performing Arts	3.0 FTE

Secondary (7-12) Teaching Services

English	2.6 FTE
Math	1.4 FTE
Spanish	0.4 FTE
Physical Education	2.0 FTE
Social Science	1.8 FTE
3-D Animation/Video Prod. (ROP)	1.0 FTE
Technical Lab	1.0 FTE
TV Occupations/Audio Recording & Production	0.2 FTE

Special Education Services

Program Specialists	2.0 FTE
Inclusion Support Teachers	2.0 FTE

Special Services

Homeless Liaison PPS/Social Work	1.0 FTE
AVID (Grades 9-12)	0.6 FTE
LINK CREW (Grades 9-12)	0.2 FTE
ELD Coordinator (Grades 9-12)	0.2 FTE
Instructional Coach (Grades 9-12)	0.2 FTE
WASC Coordinator (Grades 9-12)	0.2 FTE
Automotive Technology	0.4 FTE

3. Board Resolution 12-11² recited that with respect to employees who first rendered paid service to the District on the same day, “the order of termination will be based solely on the needs of the District and the students thereof.” The District adopted tie-breaking criteria to be applied in such instances.

4. The Board further determined that it shall be necessary by reason of the reduction and/or discontinuance of services to decrease the number of permanent and/or probationary certificated employees at the beginning of the 2012-2013 school year, and directed the Superintendent or his designee to proceed accordingly by notifying the appropriate employees to implement the Board’s determination.

5. On or before March 15, 2012, the District served the affected certificated employees including respondents, with written notice, pursuant to Education Code sections 44949 and 44955³, that their services would not be required for the next school year (Notice). Each Notice set forth the reasons for the recommendation. The Notice attached and incorporated by reference Resolutions No. 12-09 and 12-11 that listed the services to be reduced or discontinued, resulting in a proposed reduction in the certificated staff by 26.4 FTE positions.

6. Requests for Hearing were timely filed by all respondents to determine if there is cause for not reemploying them for the next school year.

7. The Director of Human Resources made and filed Accusations against each of the certificated employees who requested a hearing. The Accusations with required accompanying documents and blank Notices of Defense (Accusation packet) were timely served on the respondents.

8. Each respondent is presently a certificated permanent or probationary employee of the District.

9. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955.

Services to be Reduced or Eliminated-Leroy Greene Academy Charter School

10. Respondents raised two contentions regarding the proposed establishment of the Leroy Greene Academy charter school next school year. First, respondents argue that the creation of positions at the charter school identical to those proposed by District for reduction demonstrates that the PKS reductions are illusory and therefore invalid. Second, respondents

² Board Resolution 12-11 amended the Board’s earlier Resolution 12-09 adopted on February 28, 2012. The earlier Resolution was incorporated and revisions were made including those reflected in the particular kinds of services identified above.

³ All future statutory references are to the Education Code unless otherwise indicated.

argue that they should be able to “bump” into positions at the charter school for which they are certificated and competent.

11. District’s Governing Board has approved the creation of the Leroy Greene Academy (LGA) to serve students in grades Kindergarten through 12 in the 2012-2013 school year. The evidence did not establish whether the California Department of Education had approved the charter school at the time of hearing. In school year 2012-2013, the LGA will open with grades 7 through 12. Students in the 7th and 8th grades will be exposed to the two programs offered in the school: visual arts and business and marketing. The “Governance Structure” portion of the charter document recites that the charter school is a “separate legal entity” with “oversight responsibility vesting in the authorizing agency: The Board of Trustees of the District.” The document provides that “the Board of Trustees may approve, modify, or reverse any recommendation, decision, or other action by the Charter School’s Executive Council or Principal.” The Executive Council serves as the school’s Board of Directors and is comprised of five members including the District’s Chief Business Officer, and Superintendent. The section of the charter document addressing staff employment qualifications states that all persons employed by the Charter School are employees of the Charter School (except the Principal) and “shall not be deemed to be employees of the District for any purpose whatsoever.” All employees are to be hired on an open basis and will enter into a contract with the Charter School. All employees are to be “at will” and may be terminated without cause or prior notice. Charter School employees have no transfer rights to a District school site. In a separate section dealing with return rights of district employees, the document reiterates that the Charter School is a separate legal entity and, “[a]ccordingly, District employees (certificated, classified, or otherwise) shall have no employment rights or rights to transfer with respect to the Charter School.” District employees must resign from the District if employed by the Charter School.

12. District has provided services to LGA, as it has to the five “independent” charter schools within District boundaries. The District has provided human resources services to LGA, including assistance in the interviewing and hiring of certificated employees. Other services provided charter schools included auditing and transportation.

13. Course offerings at LGA for the ensuing school year include physical education, English, social studies, mathematics, and Spanish. These subjects are all included the District’s proposed PKS reductions.

Respondent Rodney Ford

14. Respondent Rodney Ford has taught in the District for 14 years, most recently at Inderkum High School, teaching computer technology, video production, and 3-D animation. Mr. Ford holds three credentials. The credential relevant to these proceedings is his Clear Designated Subjects Vocational Education Teaching Credential, Full Time. The designated subject that Mr. Ford is authorized to teach is Media Production Occupations.

District proposes to eliminate 1.0 FTE 3-D Animation/Video Prod. (ROP)⁴, the entirety of Mr. Ford's current assignment, and have him bump into .20 FTE TV Occupations/Audio Recording and Production, an assignment currently held by a junior ROP instructor. Mr. Ford asserts that he should be able to bump into any number of positions held by junior certificated employees teaching media related subjects. These courses include digital photography, graphic design/web authoring, technical lab, technology, activities director, and electronic music. District responds that Mr. Ford's credential only permits him to teach courses "designated" as vocational education (including ROP courses). Cael Kuhlman, a junior employee, does teach digital photography in an ROP setting, but District contends that respondent Ford is not competent to teach digital photography because he has not previously taught it. Respondent Ford conceded in his testimony that he has not taught digital photography under that course name, but he has taught students to use Adobe Photoshop, the software program he described as the industry standard for digital photography. Respondent Ford established that he has taught high school level computer technology, video production and 3-D animation for the District in the past. His current classes were designated ROP last year and did not carry that designation previously.

15. No evidence was submitted by the parties by which to ascertain whether digital photography falls within the designated subject Media Production Occupations. The Administrative Law Judge has taken official notice of a publication by the California Teacher Credentialing Commission (CTC) explaining the new provisions of law enacted by the Legislature and the applicable provisions of law addressed. The provisions which relate to the creation of the new designation and the implementation by the CTC are sections 44260.1 and California Code of Regulations, title 5, section 80035.5. Effective January 1, 2009, the sort of credential held by respondent Ford was renamed a Designated Subjects Career Technical Education (CTE) credential. The designated areas are now known as "industry sectors." One of these is the "Arts, Media and Entertainment" subject. The CTC listed "specific subjects" which may be taught in each area and included "Commercial Photography" in the arts, media and entertainment subject. It is reasonable to assume that an occupational course in digital photography would fall into this subject.

Respondent Shawn Gour

16. Respondent Gour is one of several respondents who assert the right to bump into a categorically funded position held by Barbara Martinez, who is junior to these respondents. Respondent Gour, a physical education teacher losing .60 of his 1.0 FTE, also contends that he should be retained because two junior teachers currently teaching physical education will be retained. Respondent Gour asserts that a recent resignation of a physical education teacher should result in the a change in the PKS number for physical education from 8.2 FTE to 7.2 FTE and, as the most senior employee, he would be therefore be entitled to return of his .60 FTE, with .40 FTE going to the next most-senior physical education teacher. Lastly, respondent Gour contends that the District's decision to eliminate all of the

⁴ ROP stands for Regional Occupational Program.

elementary level physical education teachers will result in a violation of the legislative mandate that elementary students receive at least 200 minutes every 10 school days.

17. Jennifer Espinoza and Alyssa McMurray, the two junior physical education teachers identified by respondent Gour are being reassigned next school year, so neither will teach a course for which respondent Gour is certificated and competent to teach.

18. Barbara Martinez was hired as a temporary certificated employee to teach in a grant funded program aimed at deterring bullying in the school district. District entered into a Memorandum of Understanding (MOU) with the Sacramento County Office of Education (SCOE). The terms of the MOU included that SCOE would pay \$28,000 to District to support a "Bullying Prevention Program." The MOU is "in effect" from January 1, 2011, until June 30, 2012. SCOE agreed to pay invoices for services rendered within 90 days with the final report and invoice (for school year 2011-2012) due June 30, 2012. There is nothing in the MOU to suggest that funding will continue beyond June 30, 2012. On February 22, 2012, Sally Clark sent a letter to Barbara Martinez informing her that her employment will end on May 25, 2012. Thus, while the termination date does precede the end of the funding period, there is no question that the categorically funded position ends this school year, and Ms. Martinez will not occupy a position in the ensuing school year into which respondent Gour or other more senior certificated employees may bump.

19. Carol Rindon, a full time physical education teacher, submitted her resignation on or about March 19, 2012, after the District's preliminary notice was issued. District could have adjusted the PKS number relating to physical education services, but it was not required to do so, as more fully discussed in the Legal Conclusions.

20. David Sanchez and Marcus Luna will teach physical education classes at Discovery High School next year. Discovery High School is the district's alternative high school. Neither Mr. Sanchez nor Mr. Luna has a physical education credential. They are credentialed to teach academic core subjects and each is No Child Left Behind Act (NCLB) certified "highly qualified" in his respective core academic subject. They teach the physical education courses because there are only six teachers at the alternative high school and each has a core academic areas and other non-academic course to fill out their course load. Mr. Gour is willing to teach at the alternative high school, but he is not certificated or highly qualified in any of the academic core subjects taught. David Sanchez teaches .50 math, .33 social sciences, and .17 physical education. He is junior to respondent Shawn Gour. Marcus Luna teaches .50 art and .50 physical education. Mr. Luna is senior to respondent Shawn Gour.

21. District intends to provide the mandated level of physical education instruction to elementary school children by having classroom teachers provide the instruction. This will satisfy the legislative mandate, and as discussed below in the Legal Conclusions, providing services in a different manner is a legally permissible PKS reduction.

Respondent Stacy Williams

22. Respondent Williams is losing her 1.0 FTE position by virtue of bumping by more senior certificated employees into her .60 physical education classes, her .20 FTE Mandatory Academic Study Hall class, and .20 FTE social sciences to which she was misassigned by District based on her physical education credential. Respondent Williams raised the same issue regarding Barbara Martinez and the same issue relating to the creation of the LGA. Respondent also challenged whether District is actually reducing the proposed PKS, when District has entered into a contract with Teach for America, by which that entity will provide between four and six teachers or interns next school year. Respondent Williams also contended that she should be able to bump into physical education classes taught by junior employee David Sanchez (she is junior to Marcus Luna). She is also senior to respondent Lundon Jackson, who was issued a “precautionary notice” by District. Respondent Jackson is the core science teacher at Discovery High School. One of her courses is Health, which respondent Williams is certificated and competent to teach with her supplemental authorization in Introductory Health Science. Respondent Lundon Jackson teaches Earth Science .33, Environmental Science .33, and Health .17. Ms. Williams has taught in an alternative high school and she would consent to teach at Discovery High School.

23. On March 16, 2012, District entered into a professional services agreement with Teach For America, Inc., a non-profit affiliated with AmericaCorps. The agreement requires District to place as classroom teachers between four and six “eligible” candidates provided by Teach For America, Inc. In the event that eligible teachers are not placed within the time limits specified in the agreement, District must pay for each such teacher a daily amount capped at \$8,000, to cover the teacher’s living expenses. Sally Clark explained that any vacancies in the ensuing school year will first be offered to certificated teachers on the reemployment list as required by law, and vacancies which cannot be filled in that manner may be offered to eligible teachers affiliated with Teach For America, Inc. Ms. Clark predicts that most of such positions will be in special education where positions are typically hard to fill. In summary, there is nothing in the District’s contract with Teach For America, Inc. that negates the District’s proposed PKS reductions in the ensuing school year.

LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied.

Respondents' Right To Bump Into LGA

2. Education Code section 47610 reads:

A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except all of the following:

- (a) As specified in Section 47611.
- (b) As specified in Section 41365.
- (c) All laws establishing minimum age for public school attendance.
- (d) The California Building Standards Code (Part 2 (commencing with Section 101) of Title 24 of the California Code of Regulations), as adopted and enforced by the local building enforcement agency with jurisdiction over the area in which the charter school is located.
- (e) Charter school facilities shall comply with subdivision (d) by January 1, 2007.

3. The legislature exempted charter schools from virtually all of the Education Code provisions that do not specifically pertain to charter schools. This included the provisions relating to teacher rights in layoff proceedings, including Education Code section 44955. Respondents have not cited any provision of law or case holding which conflicts with the plain meaning of Education Code 47610. District certificated employees enjoy no statutory right to bump into positions within a charter school, irrespective of the characterization of the charter school as “dependent” or “independent.” The charter language summarized in the factual findings makes it clear that LGA, as an independent entity, will make employment decisions and teachers hired to work at LGA will not attain tenured status in the manner teachers do in District at large. In summary, the creation of LGA as a dependent charter school does not vitiate the District’s proposed PKS reductions in the areas in which teaching positions will be available at LGA that are substantially identical to those being reduced by District. Also, respondents have no right to bump into such positions, even if otherwise certificated and competent to do so and the positions are occupied by junior certificated employees.⁵

Mandated Physical Education Instruction in District Elementary Schools

4. Respondents challenge District’s intention to provide the legally mandated 200 minutes every 10 school days of physical education to elementary students with classroom teachers. A district may not dismiss an employee pursuant to section 44955 and yet continue the identical kind of service and position held by the terminated employee. (*Campbell Elementary Teachers Assn., Inc. v. Abbott*

⁵ There was no evidence presented by which to ascertain whether teachers have yet been employed at LGA.

(1978) 76 Cal. App.3d 796,812.) If there is no difference in the method or manner of providing a particular service, a school district may not justify the substitution of personnel by claiming a reduction in services. (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal. App.3d 831, 843-844.) [health services were not reduced by virtue of replacing certificated nurses with other employees].) However, as long as there is a change in the method of teaching or in the particular kind of service in teaching a subject, a particular kind of service provided in excess of any statutorily mandated minimum can be reduced or eliminated. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App.4th 627, 637.) District's plan to provide elementary physical education with classroom teacher constitutes a permissible PKS reduction.

Positively Assured Attrition (Resignation of A Physical Education Teacher)

5. Respondents contend that with the resignation of Carol Rindon, a full time physical education teacher following the District's PKS reduction resolution, the 8.2 FTE reduction of physical education should be reduced by 1.0 FTE to 7.2 FTE. A school district need not consider positively assured attrition occurring between the date of preliminary notice and the final notice in determining number of certificated employees to be terminated by reason of a reduction or discontinuation of a particular kind of service. . (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App.4th 627, 635.)

Respondent Ford's Bumping Rights

6. Education Code section 44256, subdivision (d), and California Code of Regulations, title 5, section 80035, subdivision (c), limit the positions which respondent may teach to those designated by District as vocational education courses, including ROP. He is not limited, as suggested by District, to courses specifically designated ROP. None of the junior teachers identified by respondent Ford as those teaching multimedia courses will teach a course designated by the District as vocational education or ROP except the courses that Cael Kuhlman will teach. Mr. Kuhlman will teach 1.0 Digital Photography courses in the ensuing school year and the courses have been designated ROP by the District. The titled course is not listed among the specific subjects that a designated subject credential in the Arts, Media and Entertainment area, the relatively new name given to respondent Ford's Media Production Occupations, authorized area. However, the list includes commercial photography. A vocational education course in digital photography fits within that specific subject category. District argued that respondent Ford has not previously taught a digital photography course. Since respondent Ford is certificated to teach the course, this argument implies he is not "competent" to do so. The District's competency criteria only require the possession of the appropriate credential and NCLB highly qualified status for those teaching academic subjects, which respondent Ford does not teach.

7. District is retaining Mr. Kuhlman, who is junior to respondent Ford, in violation of section 44955, subdivision (b). Therefore, respondent Ford may not be laid off .80 FTE.

Respondent Gour's Bumping Rights

8. It appears that respondent Gour will move from elementary school physical education into .40 FTE middle school physical education classes previously taught by Ms. Espinosa, who is being reassigned to other non-physical education classes. David Sanchez, who is being retained, is junior to respondent Gour and is scheduled to teach one physical education class (.17 FTE) at Discovery High School, the District's alternative high school. Marcus Luna, another alternative high school teacher, will teach .50 physical education, but Mr. Luna is senior to respondent Gour. Respondent Gour therefore satisfied his burden of establishing that a junior employee is being retained to teach a course that respondent Gour is certificated and competent to teach in violation of 44955, subdivision (b). He expressed his consent to teach at the alternative site in his testimony. There may have been logistical problems with Mr. Gour's working at two school sites, but District presented no evidence to establish that splitting Mr. Luna's assignment would not be feasible. (See *Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal. App.4th 334.) Respondent Gour is entitled to retain an additional .17 of his position.

Respondent Williams' Bumping Rights

9. Respondent Williams is certificated and competent to teach respondent Lundon Jackson's .17 FTE Health class at Discovery High School. Respondent Williams has previously taught in an alternative high school environment and she has consented to do so again. The District's assignment of personnel to teach core academic subjects at Discovery High School is an effective approach to students with academic deficiencies, but District offered no evidence to suggest that splitting off respondent Jackson's one health class would jeopardize the overall educational program at the alternative high school. Respondent Williams is entitled to a .17 FTE position and respondent Jackson shall be laid off a corresponding .17 FTE.

Barbara Martinez Issue

10. The parties spent considerable time addressing the question whether Ms. Martinez was a temporary or probationary employee. However, even if she was entitled to treatment as a probationary employee, she will not be teaching next year and will therefore not be occupying a position that any respondent is certificated and competent to fill. The MOU between District and SCOE expires June 30, 2012, and with it the funding for the Bullying Prevention Program in which she teaches. District notified her that she will no longer be employed as a temporary teacher as of May 25, 2012. This is obviously before the end of the contract between District and SCOE, and this "early" termination may have entitled Ms. Martinez to the

protections afforded a probationary teacher under the reasoning of *Stockton Teachers Association CTA/NEA v. Stockton Unified School District* (2012) 2012 WL 663158 (Cal.App.3d). However, there is no question that Ms. Martinez's categorically funded position and the underlying contract will end this school year and she will not be retained in a position next school year that could be assumed by a more senior respondent.

Teach For America Contract

11. The four to six teachers that may be provided by Teach for America, Inc., to the District will not occupy positions now slated for reduction or elimination, unless District is unable to fill them from the reemployment list. Applicable law requires the District to go first to the reemployment list. Respondents have failed to establish that the agreement with Teach For America, Inc. is inconsistent with the Governing Board's determination to reduce or eliminate the identified PKS.

ORDER

1. The Accusation against respondents are sustained and District may issue final termination notices to respondents for the particular kinds of services identified and the FTEs or percentages thereof except as follows.

2. The Accusation against respondent Rodney Ford is dismissed and his notice is rescinded.

3. The notice to respondent Shawn Gour is reduced from .60 FTE layoff to .43 FTE layoff.

4. The notice to respondent Stacy Williams is reduced from 1.0 FTE layoff to .83 FTE layoff.

5. Respondent Lunden Jackson shall receive final notice that she will be laid off .17 FTE (Health).

Dated: May 1, 2012

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings